Supreme Court, U.S.
FILED

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

ODELL JOHNSON, JR.

PETITIONER

versus

CITY OF SAN ANTONIO

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD L. PIÑA
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COUNSEL OF RECORD

24 pp

QUESTION PRESENTED FOR REVIEW

Whether a hostile work environment claim is cognizable only for claims of discrimination because of race, color, religion, sex, and national origin 42 U.S.C. § 2000e-2(a)(1) but not because of engaging in protected activity under 42 U.S.C. § 2000e?

CERTIFICATE OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

PETITIONERS

Odell Johnson, Jr.	Petitioner
Edward L. Piña	Counsel of Record in the Supreme Court and Appellate Court
Bruce J. Mery	Counsel for Petitioner in the Trial and Appellate Court
Paul J. Medellin	Co-Counsel for Petitioner in the Supreme Court and Appellate Court

RESPONDENTS

The City of San Antonio	Respondent
Jacqueline M. Stroh	Counsel for Respondent
Deborah Lynne Klein	Counsel for Respondent

Mark Kosanovich Counsel for Respondent

/S/ Edward L. Piña
Edward L. Piña

FACTS NECESSARY TO THE ARGUMENT

A. Nature of the Case and Disposition Below

1. The City of San Antonio (hereinafter "City"), unlawfully discriminated against the plaintiff/appellant, Police Officer Odell Johnson, Jr., by: (1) retaliating against Johnson when he filed an internal EEO complaint and then testified in an internal San Antonio Police Department ("SAPD") Fairness Hearing in opposition to unlawful discriminatory police orders and activities directed against racial minorities; and (2) creating a hostile work environment on account of his protected activities and his race, Black. The plaintiff made out a *prima facie* case for each of the above and can further provide evidence that the defendant's alleged legitimate, nondiscriminatory reasons were mere pretext for unlawful discrimination.

2. Mr. Johnson's complaints were substantiated internally by the SAPD but not remedied. Therefore, he filed an external EEO complaint which likewise found reasonable cause to believe he had been discriminated against and again the City failed to remedy the discrimination. Suit was therefore timely filed in the United States District Court for the Western District of Texas San Antonio Division. The case was dismissed however when the lower court granted Defendant's Motion for Summary Judgment over plaintiff's opposition. Judgement for the City of San Antonio was

entered by the Clerk of Court on August 21, 2000. Notice of Appeal was timely filed and entered on September 5, 2000.

3. A panel of the Fifth Circuit thereafter affirmed the decision on August 31, 2001.

B. Facts Relevant to Issues Presented for Review

4. This case involves the Fifth Circuit's judicial sanction of managerial retaliation and creation of a hostile work environment against subordinate employees on account of race under 42 U.S.C. § 2000e- 2 and for free speech exercised in accordance with 42 U.S.C. § 2000e-3. These retaliated and harassed employees refused to unlawfully discriminate as a term and condition of their employment. Requiring an employee to unlawfully discriminate is adverse to that employee. Employees who invoked their statutory rights were subjected to retaliation and hostility to stifle their speech opposing workplace discrimination.

5. This case highlights a decision of a United States court of appeals which is in conflict with the decisions of other United States courts of appeals, in conflict with the guidelines set forth by the Equal Employment Opportunity Commission (EEOC) as well as is in direct conflict with prior decisions of this Court.

6. This case is the result of the retaliation and harassment suffered by Odell Johnson because he protested orders by Lt. Griffin to discriminate against

minorities made a condition of his employment. All police officers were ordered to run African American and Mexican American adults and youths out of the downtown riverwalk area.

7. Odell Johnson is a sixteen year police veteran. Johnson's hard work and carreer accomplishments earned him an assignment on the highly desirable Downtown Foot and Bike Patrol Unit (DFBU) evening shift from May 1992 until he was involuntarily transferred to the "dog watch" shift at another substation in January 1996. This was the most dangerous beat to which police officers could be assigned in San Antonio. At the time of his retaliatory transfer he was the only Black officer assigned to the DFBU. Officer Johnson was punished for his speech in asserting his Title VII rights as set forth below.

ARGUMENT AND AUTHORITIES

Whether a hostile work environment claim is cognizable only for claims of discrimination because of race, color, religion, sex, and national origin 42 U.S.C. § 2000e-2(a)(1) but not because of engaging in protected activity under 42 U.S.C. § 2000e?

8. The Fifth Circuit has decided an important federal question in a way that is in conflict with other Circuits and the relevant decisions of this Court. The circuit court has impermissibly burdened employees by

drawing a bright line where none is permitted. The Fifth Circuit has abrogated its duty under this Court's ruling in **Harris v. Forklift Sys. Inc.**, 510 U.S. 17, 21 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). The City of San Antonio impermissibly "[required Officer Johnson] to work in a discriminatorily hostile or abusive environment".

9. The Fifth Circuit denied Officer Johnson's appeal as to his hostile work environment claim by holding hostile work environment claims are not cognizable under 42 U.S.C. § 2000e-3.

10. Circuits outside the Fifth have long held to establish a hostile work environment claim, an employee must show claims are cognizable by virtue of one's protected class. See **Boykin v. Michigan Department of Corrections**, 211 F.3d 1268 (Table), 2000 WL 491512 (6th Cir.(Mich.)), **Goodman v. State of Maryland Department of Social Services**; 64 F.3d 657 (Table), 1995 WL 501355 (4th Cir.(Md.)) (unpublished opinion), **Bishena v. Marriott Corporation** 959 F.2d 239 (Table), 1992 WL 73193 (9th Cir.(Ca.))(unpublished opinion)

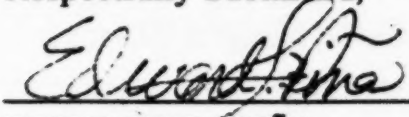
11. Title VII's remedial purpose of eradicating employment discrimination would be unmet if a claim for hostile work environment on account of protected activity were not allowed in the Fifth Circuit.

REASONS FOR GRANTING WRIT AND CONCLUSION

12. The Fifth Circuit's has decided an important federal question in a way that is in conflict with other circuits and also in conflict with prior decisions of this Court. The circuit court has impermissibly burdened employees who engage in protected activity by denying them a remedy for a charge of hostile work environment retaliation on account of protected activity.

13. WHEREFORE, PREMISES CONSIDERED, petitioner, Odell Johnson, Jr. prays that the Court thoroughly consider this Petition for Writ of Certiorari then grant the Writ of Certiorari. Attorney fees and costs are also requested.

Respectfully Submitted,



EDWARD L. PIÑA

IN THE UNITED STATES COURT OF APPEALS

U.S. COURT OF APPEALS
FOR THE FIFTH
CIRCUIT FILED

AUG 31 2001

CHARLES R. FULBRUGE III
No. 00-50834
CLERK

ODELL JOHNSON, JR.

Plaintiff-Appellant,

versus

CITY OF SAN ANTONIO

Defendant-Appellee.

APPENDIX

Appeals from the United States District Court
for the Western District of Texas, San Antonio
USDC No. 99-CV-575

Before JOLLY, SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Odell Johnson, Jr., a black police officer with the San Antonio Police Department, appeals the district court's grant of summary judgment to the City of San Antonio on his Title VII retaliation and hostile work environment claims. Because we find that the district court correctly granted summary judgment of the City, we affirm.

Johnson first contends that he was retaliated against in violation of 42 U.S.C. § 2000e-3 because he protested Lt. Griffin's discrimination against him on the basis of race and because he protested Griffin's orders to enforce the law in a discriminatory manner. We have construed Title VII's anti-retaliation provision narrowly, holding that it only applies when the plaintiff

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX

is subjected to an "ultimate employment decision" such as "hiring, granting leave, discharging, promoting, and compensating." Watts v. The Kroger Co., 170 F. 3d. 505, 511-12 (5th Cir. 1999). Johnson was involuntarily transferred out of the Downtown Foot and Bike Patrol Unit ("DFBU") to the Northside Substation. A lateral transfer with no significant change in benefits is not an adverse employment action. Burger v. Central Apartment Management, 168 F. 3d 875, 879 (5th Cir. 1999). In Serna v. City of San Antonio, 244 F. 3d 479 (5th Cir. 2001), we found that another San Antonio police officer who was also transferred out of the DFBU to a regular patrol unit did not suffer an adverse employment action in the context of First Amendment retaliation. Johnson has not produced any evidence that distinguishes his transfer out of the DFBU to a regular patrol unit from Serna's transfer out of the DFBU to a regular patrol unit; as in Serna, there was insufficient change in Johnson's pay, benefits or level of responsibility to constitute a demotion for the purpose of retaliation. Thus, Johnson's retaliation claims fail because there is no evidence that he was subjected to an adverse employment action.

Even if Johnson had been subjected to an adverse employment action, his Title VII retaliation claims based on his objections to Lt. Harry Griffin's alleged orders to discriminate against San Antonio residents would fail because the actions complained of

were not "unlawful employment practices" under Title VII. See 42 U.S.C. § 2000e-3 (emphasis added). The discrimination at issue in this charge affected the citizens of San Antonio, who were not San Antonio Police Department employees. Thus, Johnson's opposition to Griffin's orders does not constitute a protected activity under Title VII.

Similarly, Johnson's hostile environment claim based on his opposition to griffin's orders cannot succeed because it does not involve discrimination with respect to Johnson's "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added). Instead, this charge concerns the San Antonio Police Department's discrimination because of Johnson's opposition to Griffin's orders.

Finally, Johnson argues that he was subjected to a hostile work environment based on his race. While Johnson introduced some evidence that Lt. Griffin ridiculed and attempted to intimidate him, he fails to make a prima facie case on the claim of hostile work environment because there was no evidence that any of the discrimination was related to Johnson's race. See Walker v. Thompson, 214 F. 3d 615, 625 (5th Cir. 2000) (listing "racially discriminatory intimidation, ridicule and insults" as an element of a hostile work environment claim). After reviewing the record, we

agree with the district court's conclusion that Johnson's "problems with Lt. Griffin would appear to have extended across the board and not to have centered around race." The City was Therefore also entitled to summary judgment on Johnson's Title VII hostile work environment claim.

Because we find no genuine issue of material fact on Johnson's Title VII retaliation and hostile work environment claims, the City is entitled to judgment as a mater of law. The district court's judgment is therefor.

AFFIRMED.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS

FILED

AUG 31 2001

No. 00-50834

CHARLES R. FULBRUGE III

CLERK

D.C. Docket No. SA-99-CV-575-HFG

ODELL JOHNSON, JR

Plaintiff - Appellant

V.

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Defendant - AppelleeFILED

SEP 28 2001CLERK, U.S. DISTRICT COURT

BY /s/

DEPUTY CLERK

WESTERN DISTRICT OF TEXAS

Appeal from the United States District Court for the Western District of Texas, San Antonio.

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Before JOLLY, SMITH, and WIENER, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: SEP 24 2001

OP-OA-J1
A true copy
Test
Clerk U.S. Court of Appeals, Fifth Circuit
By _____/s/_____ Deputy
New Orleans, Louisiana SEP 24 2001

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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D.C. Docket No. SA-99-CV-575-HFG

ODELL JOHNSON, JR

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Plaintiff - Appellant

SEP 28 2001

CLERK, U.S. DISTRICT COURT

V.

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BY /s/
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Court of Appeals, Fifth Circuit

By _____

/s/_____

Deputy

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Orleans, Louisiana SEP 24 2001